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SURFACE TRANSPORTATION BOARD

DECISION

Sec. 5a Application No. 118 (Amendment No. 1), et al.[1]

EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., ET AL.

Decided: December 10, 1998

The Surface Transportation Board indicates that it will approve motor carrier rate bureau agreements for one year, after which, absent a clear expression from Congress to the contrary, any bureau seeking continued antitrust immunity will be required to reduce "benchmark" rates.

BY THE BOARD:

We find that renewal of motor carrier rate bureau agreements would not contravene the public interest, but only if "benchmark" rates are reduced. Thus, we establish a procedure to effect appropriate benchmark rate reductions, which will take effect after one year absent a clear expression from Congress to the contrary.

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[1] This decision embraces six other motor carrier rate bureau applications: Sec. 5a Application No. 34 (Amendment No. 8), Middlewest Motor Freight Bureau, Inc.; Sec. 5a Application No. 46 (Amendment No. 20), Southern Motor Carriers Rate Conference, Inc.; Sec. 5a Application No. 22 (Amendment No. 7), Pacific Inland Tariff Bureau, Inc.; Sec. 5a Application No. 60 (Amendment No. 10), Rocky Mountain Motor Tariff Bureau, Inc.; Sec. 5a Application No. 45 (Amendment No. 13), Niagara Frontier Tariff Bureau, Inc.; and Sec. 5a Application No. 25 (Amendment No. 8), The New England Motor Rate Bureau, Inc.

BACKGROUND

A. Legislative and Regulatory Background. Since the 1940s, interstate motor carriers have been permitted to collectively determine rates and practices that apply to the transportation they provide. Under the Reed-Bulwinkle Act,[2] now codified (as to motor carriers) at 49 U.S.C. 13703, motor carriers acting collectively could be immunized from the antitrust laws by submitting the agreements governing their collective activities to the Interstate Commerce Commission (ICC) (and now to the Board) for approval.

Carriers have historically effected collective ratesetting through what are known as rate bureaus. Rate bureaus performed a variety of functions for their members, some of which required antitrust immunity, some of which did not. Most significantly, they set rates collectively and acted as agents for their carrier members by filing tariffs at the ICC reflecting rates that had been collectively determined as well as those that had been individually set. See generally Investigation of Motor Carrier Collective Practices, 7 I.C.C.2d 388, 397 (1991) (Investigation).[3]

In the Motor Carrier Act of 1980 (1980 Act),[4] Congress substantially reduced Federal motor carrier regulation in order to promote competition. Section 14 of the 1980 Act prohibited bureaus (and their members) from interfering with any carrier's right to publish its own rates ("independent actions"),[5] and from voting on rate proposals in which they do not participate, other than general rate

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[2] Pub. L. No. 90-662, 62 Stat. 472.

[3] Many rates are derived from the class rate system, under which commodities are assigned to classes by a separate "classification" bureau, and rates are then applied (often through collective rate bureau action) to classes of commodities. A decision served today in National Classification Committee -- Agreement, Section 5a Application No. 61, which, out of deference to a legislative process that is to be initiated in the immediate future will become operative after one year absent a clear expression from Congress to the contrary, concludes that approval of an application for renewal of the classification agreement of the National Classification Committee to perform the classification function would not contravene the public interest, provided that certain changes to the agreement are made.

[4] Pub. L. No. 96-296, 94 Stat. 793.

[5] Shortly after the 1980 Act was passed, the ICC issued new regulations implementing section 14. Motor Carrier Rate Bureaus -- Imp. Pub. L. No. 96-296, 364 I.C.C. 921 (1980), aff'd in part, rev'd in part sub nom. American Trucking Ass'ns, Inc. v. United States, 688 F.2d 1337 (11th Cir. 1982), rev'd sub nom. ICC v. American Trucking Ass'ns, Inc., 467 U.S. 354 (1984) (affirming the ICC's regulations). Additionally, under its broad authority to review bureau

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increases (GRIs), changes in commodity classifications, and changes in tariff structure.[6] Throughout the 1980s, the ICC and the courts rejected several attempts by bureaus to influence individual carrier pricing by evading the ban on collective single-line ratemaking.[7]

In response to concerns subsequently voiced about motor carrier ratemaking, the ICC instituted a proceeding to inquire generally into those practices. In its final report the ICC found, among other things, that GRIs agreed upon by the bureaus produced rates that were unrealistically high, but that GRIs were, for many shippers, essentially benign due to widespread rate discounting. Investigation, 7 I.C.C.2d at 458. Thus, although it questioned the use of GRIs, and indeed the entire rate bureau structure, the ICC declined to revoke rate bureau agreements, as urged by the United States Department of Justice (DOJ), because the record lacked evidence that GRIs substantially inhibited discounting or were harmful to the majority of the shipping public. Id. at 463-64.

Since that time, two relevant statutes have been passed. First, in the Trucking Industry Regulatory Reform Act of 1994 (TIRRA),[8] Congress generally eliminated the requirement that motor carriers of general freight file tariffs at the ICC. TIRRA also required the ICC to analyze its regulatory responsibilities and identify those functions that could be eliminated. In its report, the ICC found that antitrust immunity for motor carrier rate bureaus (other than as to mileage guides and classifications) "should be withdrawn." ICC, Study of Interstate Commerce Commission Regulatory Responsibilities, Oct. 25, 1994, at 76.

Second, although various Members of Congress criticized the ICC for having permitted collective ratemaking—indeed, the ICC's involvement in the classification/collective ratemaking process was cited as one of the main reasons for abolishing the ICC—in the ICC Termination Act of

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[5](...continued)
agreements on request or on its own motion, which the Board inherited (49 U.S.C. 13703(c)), the ICC reviewed the agreements of all motor carrier rate bureaus.

[6] Section 14(b) of the 1980 Act also mandated an independent study of motor carrier ratemaking. A majority of the Motor Carrier Ratemaking Study Commission that conducted the study recommended the total elimination of antitrust immunity for motor carrier ratemaking, finding that it restrains competitive behavior. Report, Collective Ratemaking in the Trucking Industry, at 455, 534, June 1, 1983.

[7] See, e.g., Collective Ratemaking Procedures -- Niagara Frontier Tariff Bureau, Inc., 1 I.C.C.2d 317 (1984), aff'd sub nom. Niagara Frontier Tariff Bureau v. United States, 780 F.2d 109 (D.C. Cir. 1986).

[8] Pub. L. No. 103-311, 108 Stat. 1683.

1995 (Termination Act),[9] Congress extended the provisions of Reed-Bulwinkle. Congress provided that all existing motor carrier bureau agreements would be permitted to remain in effect until December 31, 1998, after which, if renewal is sought, they will continue in effect to the extent that we find that renewal is not contrary to the public interest. 49 U.S.C. 13703(d). Thus, Congress in the statute specifically directed the Board to make an affirmative decision by the end of the year with respect to existing agreements.[10] In addition, the Termination Act eliminated agency oversight of the reasonableness of rates charged for transportation of general freight, except, as here pertinent, for collectively set rates. 49 U.S.C. 13701(a).

B. This Proceeding. By decision served May 20, 1997, and notice published the same day in the Federal Register at 62 FR 27653, we requested comments on the following issues: (1) whether we should renew motor carrier rate bureau agreements; (2) whether antitrust immunity is necessary for any bureau activity other than collective ratemaking; (3) whether we should grant the applications of the rate bureaus that had been filed at the ICC for authority to expand their activities nationwide; and (4) whether the bureaus can admit shippers and other noncarriers as members.

Opening comments were filed by the following parties:[11] EC-MAC Motor Carriers Service Association, Inc. (EC-MAC); The Health & Personal Care Distribution Conference, Inc., jointly with The National Small Shipments Traffic Conference, Inc.; Middlewest Motor Freight Bureau, Inc.; The National Industrial Transportation League; The New England Motor Rate Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc. (Niagara); Pacific Inland Tariff Bureau, Inc.; Professor Andrew F. Popper; Rocky Mountain Tariff Bureau, Inc.; Reliance Electric Company; Southern Motor Carriers Rate Conference, Inc. (SMCRC); Tom O'Loughlin; DOJ; and the United States Department of Transportation (DOT). Reply comments were filed by several parties. In general, the shipper groups and government entities opposed continued immunity, while the motor carrier interests supported it.

Additionally, we received letters from the Honorable Nick J. Rahall, II, and the Honorable Jack Quinn, Congress of the United States, expressing their support for continued approval of collective ratemaking agreements. Each stated that the collective ratemaking process has been used to provide procompetitive services to shippers, although each also recognized that the Board was

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[9] Pub. L. 104-88, 109 Stat. 803.

[10] In contrast to its treatment of existing agreements, Congress provided that the Board should approve new bureau agreements "only if it finds that such agreement is in the public interest," 49 U.S.C. 13703(a)(2).

[11] In addition, numerous comments that were not served upon the parties listed in our notice in the Federal Register were placed in the docket in the proceeding.

"given ample authority to oversee and fine tune any motor carrier activity under this immunity to the extent it may be needed."[12]

DISCUSSION AND CONCLUSIONS

A. Antitrust Immunity for Collective Ratemaking. Although our notice listed four issues, we believe the central question here relates to the terms, if any, under which rate bureaus should be authorized to continue collective ratemaking and related activities[13] free of antitrust scrutiny. Because we find that collective ratemaking, as it is currently administered, produces unrealistically high "benchmark" rates and thus is contrary to the public interest, after a one-year "grace period" imposed out of deference to a legislative process that is to be initiated in the immediate future, absent a clear expression from Congress to the contrary, we will continue immunity only if benchmark rates are reduced.

At the outset, while we do not find that continuation of the collective ratemaking process is categorically contrary to the public interest, we cannot accept the assertions of the rate bureaus that the current system affirmatively promotes the public interest because it is procompetitive. According to the argument, motor carrier pricing can be efficient only if it revolves around some form of benchmark rate.[14] Apparently, the theory goes, if carriers and shippers do not have a benchmark rate (presumably a collectively set class rate) to use as a reference point, there will be a "proliferation of unilaterally-set carrier rates which create[] [a] deluge of data which impair[] rather than aid[] competitive pricing decisions." SMCRC Reply at 44.

We can accept the idea that trucking companies can benefit from having a baseline from which to make their actual pricing decisions. As counter-intuitive as it sounds, we might even also accept, at least for purposes of argument, the notion that too much information could turn out to be a competitive burden rather than a legitimate pricing tool.[15] Neither assumption, however, supports the assertion that continuation of the current system promotes competitive pricing or the public

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[12] We also received a letter from several Members of Congress dated November 17, 1998, discussed further later, indicating that Congress intends to review motor carrier issues in connection with the Board's reauthorization next year.

[13] Acting under approved bureau agreements, motor carriers may collectively establish GRIs, through routes and joint rates, divisions of joint rates, and rules. In this decision, we refer to these four activities generally as "collective ratemaking."

[14] As it is expressed by SMCRC (opening statement at 48), "baseline class rate scales [are] the quid pro quo for ensuring competitive pricing."

[15] The rate bureaus suggest that small carriers need them in order to process information efficiently. But any procompetitive services that the bureaus provide—i.e., any services other than collective ratesetting—do not violate the antitrust laws and thus do not require antitrust immunity.

interest. Indeed, if all that carriers needed were a baseline to which they can refer when making individual pricing decisions, they already have it: the class rate on any given commodity as of the date of this decision (or one week or one month or one year before this decision).[16]

Moreover, we are not as sanguine as the ICC appeared to be in its determination in Investigation that the current system of collective ratemaking is essentially benign. The commenters all appear to agree that the rates established by the bureaus are not typically charged by bureau members to most shippers, and that discounts of up to 50% and more are common. The ICC reasoned that the harm associated with such unrealistically high collectively established rates is minimal because the class rate levels, which the carriers can refer to as "list prices," are only paid by a handful of uninformed or pressured shippers that might be able to protect themselves by more careful rate shopping. But it is not so clear that every shipper is in fact in a position to shop for a reasonable and competitive rate. To the contrary, it is just as likely that collective ratemaking continues to attract motor carriers because the carrier participants believe that enough shippers pay the collective rates, or the collective rates with only a minimal discount, to warrant their efforts to continue them. Indeed, such a conclusion is supported by the fact that over an extended period of time, GRIs have continued to be taken even as discounting has assertedly become steeper and more prevalent.[17] If the industry simply needed a baseline, and was not using collective ratemaking as a way to increase revenues from more vulnerable shippers, carriers would have no motivation for seeking GRIs.

In any event, it is undisputed that some shippers pay undiscounted or minimally discounted class rates, and we do not believe that their situation can be ignored. One feature of more

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[16] We understand the argument that there could be any number of baselines available, and that, unless an authoritative body definitively sets a particular standard as a baseline, businesses would be swamped with too many options to make rational choices. As we give business more credit than that, however, we find the argument hard to accept. The bureaus may also take the position that, even if the existing class rates were frozen as a permanent baseline, joint-rate partners would still need immunity to interact as to actual rate levels. As the ICC, DOJ, and the reviewing court found in connection with a railroad case raising some similar issues, procedures can be feasibly developed to permit "direct connectors" to set joint rates without antitrust immunity. See Petition to Delay Applic. Of Direct Connector Requirement, 367 I.C.C. 886 (1983), aff'd sub nom. American Short Line RR Ass'n v. United States, 751 F.2d 107 (2d Cir. 1984). In any event, as discussed later, the approach contemplated by this decision will permit bureaus to continue to operate with immunity and to develop their own authoritative baseline rates; those rates will simply have to be set at levels below the prevailing class rate levels of today.

[17] There is some debate among the parties as to the extent, if any, to which increases in collectively set rates have outpaced relevant inflation indexes. There is no debate, however, that baseline rates have increased. Indeed, some of the bureaus attribute the increase in baseline rates to the increased level of discounting.

competitive markets is that the benefits of low prices are broadly dispersed among the entire market of consumers, regardless of the fact that submarkets of consumers would, in the absence of competition, be willing to pay more for a good or service rather than do without it.[18] It may be that those shippers that now pay the inflated collective rates are not able or willing to shop for lower rates, and that they would in fact pay whatever price a carrier quoted. It may also be that an interested person can, in theory, bring these collectively set rates before the Board for review, but in practice, the shippers that pay undiscounted rates—which, not surprisingly, did not participate in this proceeding—are likely to be the least able to bring a case to the Board.[19] Thus, the most effective shipper protection that we can afford, short of abolishing collective ratemaking entirely, is to ensure that, if a carrier wants to charge a rate above a competitive level, it will not be able to justify its charges by reference to an unrealistically high list price set through a governmentally-sanctioned collective ratemaking process.[20]

We understand the bureaus' position that list prices used by trucking companies that are not rate bureau members, and by businesses in other industries, are typically set at relatively high levels, from which customers in a position to do so can obtain discounts. Those list prices, however, are not set through discussions among competitors that are protected by government immunity. Any motor carrier that wants to do so should be able to set its baseline rates at unrealistically high levels, and perhaps it should even be permitted to charge those undiscounted rates to shippers willing to pay them. If it is to do so, however, we believe that it should be required to do so pursuant to individual rather than collective action.

In short, on the basis of the record compiled in this proceeding, we find that collective ratemaking, under present circumstances, contravenes the public interest, and that existing collective

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[18] In the rail industry, with declining average costs resulting from economics of scale, scope, and density, some shippers pay more than others under the Congressionally recognized concept of "differential pricing." By contrast, Congress has not indicated that the economics of motor carriage dictate the application of differential pricing principles.

[19] Moreover, given the resources and the mission that Congress assigned us in the Termination Act, we are in no position to rule on the reasonableness of every individual motor carrier rate paid by every such vulnerable shipper, or otherwise to engage in the elaborate regulatory processes conducted by the ICC to review GRIs, to which some of the bureaus refer in their pleadings.

[20] We are not here declaring any particular rate unreasonably high. We note, however, that, if we were to review an individual motor carrier rate, one of the principal factors, if not the main factor, that we would consider would be its relation to other rates available for the services rendered. See Georgia-Pacific Corp. -- Pet. For Declar. Order, 9 I.C.C.2d 103 (1992), 9 I.C.C.2d 796 (1993), and 9 I.C.C.2d 1052 (1993), aff'd sub nom. Oneida Motor Freight, Inc. v. ICC, 45 F.3d 503 (D.C. Cir. 1995). Thus, the typical level of discounts would be highly relevant in a rate reasonableness case.

ratemaking agreements ought to be approved as not contrary to the public interest only if all existing class rates are amended to reflect market-based rates.[21] We should also point out that, if the class rate structure were appropriately modified, any effort to implement GRIs that exceed the relevant rates of inflation would be viewed as conduct that is presumptively adverse to the public interest.

In the past, the ICC would have been able to identify competitive rate levels itself by reviewing a variety of information at its disposal. As Congress sought to make the motor carrier industry more competitive, however, it reduced the Government's presence to a point where virtually no rate information is now available to us, and therefore, public input would be necessary before we could determine how the class rate structure can be amended sufficiently so that bureau agreements would pass muster. One possible approach would be to require class rate reductions, on the basis of statistically valid samples, to levels that reflect the average rates actually charged for each classification level. We would not rule out, however, suggestions that we either issue a more broad-based rate reduction order (for example, that all class rates be reduced by a uniform percentage reflecting average discounts throughout the industry), or that we break the classification down more finely to distinguish among different types of shipments within a particular classification. Our main objective, if we undertook such an effort, would be to ensure that class rates are at competitive, market-based levels.

We will not, however, initiate such an effort at this time, notwithstanding the fact that the statute requires us to determine the extent to which renewal of rate bureau agreements would contravene the public interest. That is because, in a letter dated November 17, 1998, the Republican and Democratic leadership of the Committee on Transportation and Infrastructure of the U.S. House of Representatives asked the Board to defer issuing a final ruling in cases such as this one. The letter, signed by the Honorable Bud Shuster, Chairman; the Honorable James L. Oberstar, Ranking Democratic Member; the Honorable Thomas E. Petri, Chairman, Subcommittee on Surface Transportation; and Nick J. Rahall, II, Ranking Democratic Member, Subcommittee on Surface Transportation, reads as follows:

> As you know, the Committee on Transportation and Infrastructure intends to pass legislation next year to reauthorize the Surface Transportation Board. As part of this reauthorization process, we will be reviewing a number of provisions contained in the ICC Termination Act of 1995 (ICCTA) related to motor carriers. . . . We therefore urge the Board to refrain from taking action in any case that would set major new policies or overturn existing practices in the motor carrier area before Congress has the opportunity to more fully consider and act upon these issues.

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[21] This adjustment to the rate process would address, at least to a point, the concern expressed by DOJ and some of the shipper commenters that competition among individual carriers would be more vigorous if base-line rates were at more realistic levels.

We are pleased that the leadership of the Committee on Transportation and Infrastructure has clearly indicated its intent to pass reauthorization legislation next year. Thus, to permit that process to move forward to completion, we will postpone the effectiveness of our decision. We believe that we can best meet our statutory responsibility, which calls for a decision one way or the other by the end of calendar year 1998, while respecting the legislative process that will be initiated in the immediate future, by extending approval of all existing motor carrier rate bureau agreements that are refiled in a timely manner for 1 year, until December 31, 1999; issuing this decision expressing our views on the matters that the statute requires us to consider; and awaiting the legislation to which the November 17 letter refers. If legislation addressing the rate bureau issue has not been enacted in sufficient time before the end of calendar year 1999, then, absent a clear expression from Congress to the contrary, the Board will initiate a proceeding on how to effect appropriate reductions in benchmark rates. If the proceeding is initiated, and rate bureaus and their members do not take appropriate steps to initiate benchmark rate reductions, then approval of the agreements will not be renewed.

B. Mileage Guides, Rules, and Other Ancillary Functions. In our decision initiating this investigation, we asked for comments regarding whether we should continue immunity for collectively set mileage guides, rules, and other related activities. Although the publication of mileage guides and the development of certain rules would not appear to have a substantial effect on competition, and thus technically may not require immunity, there is not always a clear line between those activities that need immunity and those that do not. However, we will here address at least those functions that obviously fall into one category or the other. Absent a clear expression from Congress to the contrary, we will permit bureaus that are seeking approval for their renewed agreements after December 31, 1999, to include in their agreements existing provisions specifically related to collective ratemaking, such as mileage guides and rules.[22] We will not grant antitrust immunity for activities that are clearly unrelated to collective ratemaking, such as the publication of independently established rates. While there is nothing to prohibit rate bureaus from engaging in activities not specifically related to collective ratemaking, they should not be immunized from the antitrust laws in those activities. In the event that we do not approve the collective ratemaking provisions of the agreement of a particular bureau for setting class rates (for example, if a bureau does not appropriately reduce its class rates), we will then have to consider whether immunity should be extended to the rate-related ancillary functions such as mileage guides and rules.

C. **Expansion of Regional Authority**. Several bureaus sought authority from the ICC to expand their regional authority and operate on a nationwide scale. Support among the bureaus for the concept is not unanimous. EC-MAC and Niagara, for example, have suggested that we maintain existing territorial limitations on the activities of the bureaus. In light of the November 17 Congressional letter, we will not rule on those requests at this time. However, we recognize the increasingly globalized nature of the transportation system and the anachronistic nature of

[22] The provisions of 49 U.S.C. 13703(a)(1) expressly permit bureaus to seek antitrust immunity for collectively set rules or mileage guides.

restrictions limiting bureaus to geographic territories. In our view, provided the bureaus reduce their class rate scales appropriately, they should be permitted to lift such territorial restrictions. Absent a clear expression from Congress to the contrary, we intend to allow bureaus whose agreements are approved after December 31, 1999, to lift the territorial restrictions on the scope of their agreements.

D. **Extending Membership Opportunities to Noncarriers**. Finally, SMCRC has asked us to grant bureau membership to shippers and other noncarriers. SMCRC's request has been questioned by other bureaus, which note the statutory language addressing agreements among carriers, and which also point out that SMCRC has not explicitly defined the rights that attach to the "associate membership" status that it seeks to confer. In light of the November 17 letter, we will not rule on this request at this time. However, even though the statutory language provides for agreements among carriers, and not among carriers and shippers, Congress plainly meant to give shippers a substantial voice in the rate bureau process. Consistent with our decision issued today in the proceeding relating to classification, we believe that shipper participation in rate bureau activities can be healthy. We would look favorably on amendments that, within the limits of the statute, give a greater role to those directly affected by rate bureau activities.[23]

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Requests for approval of motor carrier rate bureau agreements will be governed by the determinations made in this decision.

2. This decision is effective on December 18, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

[23] We note that the statute, read literally, provides that renewal of existing agreements shall be subject to the "contrary to the public interest" standard, while new agreements must affirmatively advance the public interest to be approved. Although amendments to existing agreements arguably fall under neither category, we would view the amendments discussed here as subject to the "contrary to the public interest" standard.